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NO. 89-1862

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DANIEL J. McCARTHY, Petitioner

v.

ROULETTE BLAIR, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Ninth Circuit has improperly and unduly expanded the scope of federal habeas corpus relief by granting federal collateral relief in the absence of any federal violation based solely on an alleged violation of a state procedural rule plus a finding that it is "reasonably probable" a different result would have occurred in the absence of the error of state law.

2. Whether a federal court can avoid the clear limitation on retroactive application of new federal rules, by choosing to recast the issue in terms of a "violation of state law plus prejudice," which can be claimed in almost any federal habeas corpus petition.

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October Term, 1989

DANIEL J. McCARTHY, Petitioner

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TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed on March 27, 1989, in No. 87-6690, was ordered published and is reported at 881 F.2d 602. It was modified on February 27, 1990. On March 26, 1990, the Court of Appeals issued an order for publication denying the petition for rehearing and rejecting the

suggestion for rehearing en banc, with one judge voting to grant the petition for rehearing. The opinion, modification and order are included in the appendix to this petition.

JURISDICTION

The date of the judgment which petitioner seeks to have reviewed is March 27, 1989, with a modification being ordered on February 27, 1990.

A petition for rehearing was denied on March 26, 1990. A suggestion for rehearing en banc was also rejected on March 26, 1990.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(a):

> The Supreme Court, a Justice thereof, a

circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

CALIFORNIA PENAL CODE § 1170(c)

The court shall state the reasons for its sentence choice on the record at the time of sentencing. The court shall also inform the defendant that as part

of the sentence after expiration of the term he or she may be on parole for a period as provided in Section 3000.

STATEMENT OF THE CASE

On May 23, 1983, respondent entered a negotiated plea of guilty to a violation of California Health and Safety Code section 11351, charging possession of a controlled substance (codeine) for sale. At the time of the plea California law did not require that a defendant be advised, as part of the plea process, that a mandatory parole period would follow any term of imprisonment.[1/]

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1. It was not until the decision in In re Carabes, 144 Cal. App. 3d 927, 932 n. 4, 193 Cal. Rptr. 65, 68-69 n. 4 (1983), that California law required a defendant be advised of a parole period as a direct consequence of a guilty plea. Carabes was decided nearly three months after respondent pleaded guilty. Carabes expressly held that its

As a result of the negotiated plea, respondent was granted probation for three years. He was subsequently arrested for a probation violation and sentenced to state prison for three years. On March 3, 1986, he was released on parole. He was arrested as a parole violator on August 20, 1986.

While in custody on the parole violation, respondent filed a federal petition for a writ of habeas corpus under 28 U.S.C. § 2254, claiming that his due process rights under the Fourteenth Amendment were violated when he was not informed at the time of his plea that a mandatory parole period would follow his

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requirement of parole advice at the time of the plea was to be applicable only to guilty pleas taken after the date Carabes became final. Thus, at the time of respondent's plea in the case at bar, California did not require a defendant be advised at the time of his plea that a parole period would follow the term of imprisonment. California Penal Code section 1170(c) did not require such advice at the time of the plea since section 1170(c) is a sentencing statute and required only that at the time of sentencing the court had to inform the defendant of the parole period.

period of imprisonment.

The district court ordered the magistrate to hold an evidentiary hearing. The magistrate determined that respondent had not been advised of the parole period at the time of his plea, was unaware of the parole period at the time of his plea, and would not have pleaded guilty had he been advised of the parole period. The magistrate recommended the writ be granted, and the district court adopted the recommendation and ordered respondent released from parole. The district court relied on an opinion issued by the United States Court of Appeals for the Ninth Circuit on December 23, 1986, which was three and a half years after respondent pleaded guilty. The opinion, Carter v. McCarthy, 806 F.2d 1373, (9th Cir. 1986) cert. denied 484 U.S. 870 (1987), held for the first time (thus creating a new rule) that a parole period is a direct

consequence of a guilty plea and requires advice at the time of the plea. The district court applied Carter retroactively to grant the writ.[2/]

Petitioner filed a notice of appeal on November 24, 1987. The sole issue briefed on appeal was the retroactivity of the new rule announced in Carter v. McCarthy.

On March 27, 1989, the Ninth Circuit Court of Appeals issued an opinion for publication that found the state court had violated state law when it failed to advise respondent of the period of parole at the time of the plea. The Ninth Circuit further found that respondent was "prejudiced" by this error of state law since it was "reasonably probable" that a

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2. In Allen v. Bunnell, 891 F.2d 736 (9th Cir. 1989) the Ninth Circuit subsequently held that retroactive application of Carter is not warranted since Carter had declared a 'new rule' when it announced a mandatory parole term was a direct consequence of a guilty plea.

different result would have occurred in the absence of the error. This combination of "state law error plus prejudice" was deemed sufficient to justify federal habeas corpus relief.[3/] Since the court relied on this "state law error plus prejudice" test to decide the case, it declined to address the retroactivity of Carter. (See Appendix.)

On April 5, 1989, petitioner filed a petition for rehearing and suggestion for rehearing en banc. Petitioner argued that the opinion failed to consider the fact that prior to the Carabes decision California Law did not require parole advice at the time of the plea so no violation of state law occurred. Petitioner also argued that the opinion was

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3. In its opinion, the Ninth Circuit expressly recognized it was expanding the scope of federal habeas corpus relief, but noted it believed its 'prejudice standard' for state law violations sufficiently reserved habeas corpus to appropriate circumstances. (See Appendix.)

equivalent to applying the "new rule" of Carter retroactively since relief was granted based solely on a failure to advise of a parole consequence. Finally, petitioner argued that the effect of the opinion would turn the requirement of a federal violation upside down and allow federal habeas corpus to serve as a tool for review of all state law issues whenever an allegation of "prejudice" is made.

On February 27, 1990, the Ninth Circuit modified the opinion slightly but made no significant change. On March 26, 1990, the Ninth Circuit denied the petition for rehearing with one judge voting to grant rehearing. The suggestion for rehearing en banc was also rejected, with one judge believing it might be warranted.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner urges that a writ of certiorari should be granted for the following special and important reasons:

1. The expansion of the scope of federal habeas corpus to reach any violation of state law that is coupled with "prejudice" conflicts with the clear language and intent of 28 U.S.C. § 2254(a) and the decision of this Court in Engle v. Isaac, 456 U.S. 107, 119-121 (1982), that habeas corpus relief cannot be obtained based on a mere error of state law.

2. This Court should decide an important question of federal law involved in this case, namely, whether a federal court can avoid the clear limitation on retroactive application of "new rules" by choosing to utilize the device of recasting the issue in terms of a "violation of state law plus prejudice" which can be alleged in almost any federal habeas corpus petition.

ARGUMENT

I

THE OPINION OF THE NINTH CIRCUIT IMPROPERLY EXPANDS THE SCOPE OF OF FEDERAL HABEAS CORPUS TO REACH ANY ALLEGED VIOLATION OF STATE LAW THAT IS COUPLED WITH AN ALLEGATION OF PREJUDICE AND THUS PERMITS FEDERAL COLLATERAL RELIEF IN THE ABSENCE OF ANY FEDERAL VIOLATION

In the instant case the Court of Appeals for the Ninth Circuit granted federal habeas corpus relief based purely on a violation of state law[4/] plus a finding of "prejudice." The court basically held that any violation of state procedural rules coupled with a showing that a different result was "reasonably probable" in the absence of the state law error, is sufficient to entitle a petitioner to

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4. Petitioner questions the legitimacy of the court's finding that a violation of state law occurred. At the time of respondent's guilty plea no state law required that a defendant be advised of parole consequences at the time of the plea. See Carabes, 144 Cal. App. 3d at 932 n. 4. This aspect of the case is discussed more fully in footnote 1 of this petition.

federal habeas corpus relief under 28 U.S.C. § 2254. This would turn the requirement of a federal violation upside down and allow federal habeas corpus to serve as a tool for review of all state law questions whenever an allegation of "prejudice" is made.

This error is the result of the Court of Appeals in the instant case relying on language from a case involving relief under 28 U.S.C § 2255 for a violation of a federal procedural rule in a federal conviction (United States v. Timmerick, 441 U.S. 780, 783-785 (1979)) rather than review of a violation of a state rule in a state conviction under 28 U.S.C. § 2254.

Similarly, the other cases relied upon by the Court of Appeals involved actual Sixth Amendment violations of the right to counsel that constituted due process violations of the Fourteenth Amendment (Hill v. Lockhart, 474 U.S. 52 (1985);

Strickland v. Washington, 466 U.S. 668 (1984)) rather than simply a violation of a state procedural rule. In both of the other cases cited by the Court of Appeal, no relief was granted for alleged violations of state law since no federal due process deprivation resulted. See Wayne v. Raines, 690 F.2d 685, (9th Cir. 1982) cert. denied., 464 U.S. 914 (1983); Wacht v. Cardwell, 604 F.2d 1245 (9th Cir. 1979).

Thus, for the first time, a Court of Appeals has granted relief for a violation of state law without finding a federal constitutional right was involved. This "expansion of the scope of habeas relief" is totally inconsistent with the proper limited scope of federal habeas corpus. See Engle v. Isaac, 456 U.S. 107 (1982).

This approach will allow a federal court to review any case, including capital cases, to determine if at any point a state

defendant was prejudiced by a violation of a state rule. If the court finds it "reasonably probable" that a different result would have occurred in the absence of the error of state law, it can grant relief although no federal constitutional issue is involved. This rule could be applied to any state law issue, including rules of notice, rules of evidence, or rules of pleading. The Ninth Circuit implicitly recognized it was expanding the scope of federal habeas corpus when it felt constrained to note in the opinion that "[w]hile we are cognizant of the need to avoid undue expansion of the scope of habeas relief, we are certain that . . . this prejudice standard sufficiently reserves habeas corpus relief to only those instances" where it is appropriate. In fact, it extends habeas relief into areas where it is most inappropriate. A technical violation of a state procedural

rule simply does not provide a sufficient basis for federal collateral relief.

II

A FEDERAL COURT SHOULD NOT BE ALLOWED TO AVOID LIMITATIONS ON RETROACTIVITY OF NEW RULES BY RECASTING THE ISSUE FROM FEDERAL DUE PROCESS TO A "VIOLATION OF STATE LAW PLUS PREJUDICE" ANALYSIS

In the instant case respondent claimed he was denied due process under Carter v. McCarthy, 806 F.2d 1373 (9th Cir. 1986), due to the lack of advice concerning parole consequences at the time of his plea. However, Carter v. McCarthy declared a new rule and cannot be applied retroactively to grant collateral relief. See Teague v. Lane, 109 S. Ct.1060 (1989); Penry v. Lynaugh, 109 S. Ct. 2935 (1989). In fact, in Allen v. Bunnell, 891 F.2d 736 (9th Cir. 1989), the Ninth Circuit expressly held that retroactive application of Carter was not warranted since Carter had declared a "new rule" when it announced a mandatory

parole term was a direct consequence of a guilty plea. Id., at 737-738.

In order to avoid the limitation on retroactivity the Ninth Circuit unilaterally and without notice to any party (or opportunity for briefing or argument) recast the issue as one involving state law advice concerning pleas. The court then found a state law error plus "prejudice" justified federal habeas corpus relief even though no federal due process violation was found. Of course, the court could not find the failure to advise constituted a violation of federal due process because that is the holding of Carter and retroactive application of Carter is prohibited. Interestingly, the court was extremely careful not to use the term "due process" at any point in its discussion of the issue. Clearly, the court was basing federal collateral relief solely on state law.

This device allowed the Ninth Circuit to grant relief for failure to advise of a parole consequence when retroactive application of Carter was prohibited. The same prohibited result was reached, however, since relief was granted solely for failure to advise of a parole consequence and that is equivalent to applying Carter retroactively.

The same policy considerations that prohibit the retroactive application of new federal rules to state cases on collateral review should prevent a federal court from reaching the same result as a retroactive application by resorting to the transparent device of casting the issue as one of state law. This Court should grant certiorari to make clear that new due process rules cannot be applied retroactively by merely interpreting state rules that do not rise to the level of due process violations as a basis for federal relief.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Petition for Writ of Certiorari should be granted.

Dated: May 2, 1990

Respectfully submitted,

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APPENDIX 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROULETTE BLAIR,
Petitioner-Appellee,

v.

DANIEL J. MCCARTHY, et al.,
Respondents-Appellants.

No. 87-6690
D.C. No.
CV-87-2508-WJR
OPINION

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

Submitted October 3, 1988*
San Francisco, California

Filed March 27, 1989

Before: Jerome Farris, Cecil F. Poole and
Warren J. Ferguson, Circuit Judges.

Opinion by Judge Ferguson

SUMMARY

Criminal Procedure/Habeas Corpus

Affirming the grant of a writ of habeas corpus, the court held that a prisoner had established sufficient prejudice from a state court's violation of state criminal procedure.

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

Appellee Roulette Blair pled guilty in state court to a drug charge. His conviction was subject to a mandatory parole term of which he was not informed when the plea was taken. He was later arrested and imprisoned for parole violation. He contended that the state court's error denied him due process.

[1] Once a habeas petitioner proves that the state court violated a state law by failing to inform him of a consequence of his plea, he should be granted collateral relief if he shows that there is a reasonable probability that he would not have pleaded guilty, but for the error. [2] Applying this principle to this case, the writ should be granted since it was undisputed that the petitioner was unaware of the mandatory parole term, and would not have pled guilty if he had been.

COUNSEL

William R. Weisman, Deputy Attorney General, Los Angeles, California, for the respondents-appellants.

Paul E. Potter, Potter & Cohen, Pasadena, California, for the petitioner-appellee.

OPINION

FERGUSON, Circuit Judge:

Appellant McCarthy, Director of the Department of Corrections of the State of California, appeals the district court's decision to grant appellee Blair's petition for a writ of habeas corpus. We affirm.

In May 1983, Roulette Blair, pursuant to a plea bargain, entered a plea of guilty in state court to possession of a controlled substance (codeine) for sale, in violation of the Cal.

Health & Safety Code § 11351(a). The trial court suspended Blair's sentence and placed him on probation for three years. Blair's conviction was subject to Cal. Penal Code § 3000(a), which imposes mandatory parole for a period not to exceed three years.

In December, 1983, Blair was arrested for a probation violation and sentenced to three years in state prison. In March, 1986, Blair was released on parole. He was, however, arrested as a parole violator in August, 1986, and reincarcerated.

While in custody, after exhausting his state remedies, Blair filed a federal petition for a writ of habeas corpus under 28 U.S.C. § 2254, claiming, among other things, that his due process rights under the Fourteenth Amendment of the Constitution had been violated as he was not informed of, and consequently was unaware of, § 3000(a)'s mandatory parole term at the time he entered his guilty plea in 1983. He claimed that had he known of the mandatory parole term, he would not have pleaded guilty. The district court ordered the federal magistrate to hold an evidentiary hearing. The magistrate determined that Blair was not informed of, nor otherwise aware of, the mandatory parole period when he pleaded guilty, and that he would not have pleaded guilty had he known of the parole period. Based upon this finding, the magistrate recommended that the writ be granted. The district court adopted the magistrate's findings, conclusions and recommendations, and ordered that Blair be released from any further service under his parole term. We granted a stay of the district court judgment pending final determination on this appeal, but ordered that Blair be released from state prison.

The decision whether to grant or deny a petition for habeas corpus is reviewed de novo. *Weygandt v. Ducharme,* 774 F.2d 1491, 1492 (9th Cir. 1985).

McCarthy concedes that the state trial court violated state law by failing to inform Blair that he was subject to a manda-

tory parole term. *See* Cal. Penal Code § 1170(c).[1] McCarthy also does not dispute the district court's finding that Blair was unaware of the mandatory parole term and that, had he known of such a term, he would not have pleaded guilty. Thus, we need only decide whether the harm Blair suffered as a result of the state trial court's violation of state law constitutes a sufficient basis to grant collateral relief under § 2254.[2]

This court has expressly recognized that a criminal defendant can obtain federal collateral relief for a violation of a state rule of criminal procedure. *See Wayne v. Raines,* 690 F.2d 685, 687 (1982), *cert. denied,* 464 U.S. 914 (1983) We have emphasized, however, that the defendant must show more than a mere technical violation of a state law to obtain such relief. *Id. See also United States v. Timmreck,* 441 U.S. 780, 783-85 (1979); *Wacht v. Cardwell,* 604 F.2d 1245, 1247 (9th Cir. 1979). Indeed, to support a claim for relief under 28 U.S.C. § 2254, "a petitioner must show that he was prejudiced or that his rights were affected by the omission by the state trial judge." *Wayne,* 690 F.2d at 687.

Neither the Supreme Court nor this court has had an occasion to lay out the precise contours of the prejudice standard

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[1]Section 1170(c) provides in relevant part: "The court shall inform the defendant that as part of the sentence after expiration of the term he or she may be on parole for a period as provided in Section 3000."

[2]It should be noted that the Ninth Circuit has held that lack of awareness of a mandatory parole term when pleading guilty renders the plea involuntary and thus constitutes a violation of the defendant's constitutional right of due process. *See Carter v. McCarthy,* 806 F.2d 1373 (9th Cir. 1986), *cert. denied,* 108 S. Ct. 198 (1987). Indeed, the district court relied on *Carter* in granting Blair's petition for habeas corpus. *Carter,* however, was decided more than four years after Blair entered his guilty plea. Since the district court's grant of collateral relief can be affirmed on the alternative grounds set forth below, we need not decide whether *Carter* should be applied retroactively. *See United States v. Burnette,* 698 F.2d 1038, 1049 (9th Cir.), *cert. denied,* 461 U.S. 936 (1983)(appellate court may affirm the district court on any basis fairly presented by record that, as a matter of law, sustains the judgment).

in this context. While *United States v. Timmreck*, 441 U.S. at 784 (1979), which involved a request for collateral relief based upon a technical violation of Fed R. Crim. P. 11, hinted that proof that the defendant was actually unaware of a mandatory parole term and that had he been properly advised by the court he would not have pleaded guilty may constitute a sufficient basis for providing collateral relief, the Court expressly left open the question of what set of circumstances, if any, would support collateral relief. *See also Wacht v. Cardwell*, 604 F.2d at 1247 (petitioner failed to allege any facts showing he was prejudiced by state trial court's failure to inform him of his ineligibility for parole upon acceptance of plea where petitioner did not allege he was unaware of ineligibility or that he would not have pleaded guilty had he known of ineligibility).

However, in *Hill v. Lockhart*, 474 U.S. 52 (1985), the Court had an opportunity to set forth a prejudice standard in a strikingly similar context to the case at bar. In *Hill*, the Court was faced with a collateral challenge under § 2254 to the validity of a guilty plea on the ground that the defendant had received ineffective assistance of counsel in violation of the Sixth Amendment. The Court held that the two-part test adopted in *Strickland v. Washington*, 466 U.S. 668 (1984), to evaluate ineffective assistance of counsel claims applies to challenges to guilty pleas based on ineffective assistance of counsel as well. *Id.* at 57. Thus, the Court held that in order to set aside a guilty plea, a habeas petitioner must show that his legal representation fell below an objective standard of reasonableness and that he was prejudiced by such assistance. Specifically, the Court stated that in order to satisfy the prejudice requirement in the plea context, a "defendant must show that there is a reasonable probability that, but for counsel's error(s), he would not have pleaded guilty. . . ." *Id.* at 59.

[1] We believe that the prejudice standard articulated in *Hill* is equally appropriate for determining whether collateral relief is justified in the face of a state trial court violation of

state law upon the acceptance of a guilty plea. Accordingly, we hold that once a habeas petitioner proves that the state trial court violated a state law by failing to inform him of a particular consequence of his plea, he should be granted collateral relief if he shows that there is a reasonable probability that, but for the state court's error, he would not have pleaded guilty. While we are cognizant of the need to avoid undue expansion of the scope of habeas relief, we are certain that, as implicitly recognized in *Strickland* and *Hill*, this prejudice standard sufficiently reserves habeas corpus relief to only those instances in which there has been a "fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the demands of fair procedure." *Timmreck*, 441 U.S. at 783 (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

[2] Applying this prejudice standard to the case at bar, it is clear that habeas corpus relief should be granted. McCarthy does not dispute the district court's finding that Blair was unaware of a mandatory parole term and that, had he known of the term, he would not have pleaded guilty. This finding more than satisfies the appropriate prejudice standard. Thus, we affirm the district court's order releasing Blair from any further parole obligations pursuant to his 1983 plea.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROULETTE BLAIR, *Petitioner-Appellee,* v. DANIEL J. MCCARTHY, et al., *Respondents-Appellants.*	No. 87-6690 D.C. No. CV-87-2508-WJR ORDER

Filed February 27, 1990

Before: Jerome Farris, Cecil F. Poole and Warren J. Ferguson, Circuit Judges.

ORDER

The opinion, 881 F.2d 602 (9th Cir. 1989), is amended as follows:

The first full paragraph of the second column at 881 F.2d 603 (beginning with "This court has expressly recognized . . .") is amended to read:

> It is well-established that an allegation of a mere technical violation of state law, by itself, does not support a claim for federal habeas relief. *See Engle v. Isaac,* 456 U.S. 107, 121 n.21 (1981); *Wayne v. Raines,* 690 F.2d 685, 687 (9th Cir. 1982), *cert. denied,* 464 U.S. 914 (1983). This circuit has held, however, that when a defendant has not been informed of a penal consequence of his guilty plea in violation of state law and the defendant shows that "he was prejudiced or his rights were affected by the

omission by the state trial judge," he may obtain federal collateral relief. *Wayne*, 690 F.2d at 687.

Judge Poole does not concur in the amendment.

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APPENDIX 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

March 26,1990

ROULETTE BLAIR, Petitioner-Appellee, v. DANIEL J. McCARTHY, et al., Respondents-Appellants.	No. 87-6690 D.C. No. CV87-2508-WJR ORDER

Before: FARRIS, POOLE, and FERGUSON, Circuit Judges

Judges Farris and Ferguson voted to deny and Judge Poole voted to grant the petition for rehearing. Judge Farris voted to reject the suggestion for rehearing en banc and Judge Ferguson so recommended. Judge Poole believed that rehearing en banc might be warranted.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Supreme Court, U.S.
FILED
MAY 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

89-1862

NO. 89-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

DANIEL J. McCARTHY, Petitioner,

v.

ROULETTE BLAIR, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED: OCTOBER 5, 1987

ROULETTE BLAIR, Petitioner, v. DANIEL J. McCARTHY, Respondent.	NO. CV 87 -2508-WJR(JR) REPORT AND RECOMMENDATION ON A WRIT OF HABEAS CORPUS BY A STATE PRISONER

This Report and Recommendation is submitted to the Honorable William J. Rea, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

On December 23, 1986, our Ninth Circuit Court of Appeals decided *Carter* v. *McCarthy*, 806 F.2d 1373. *Carter* had plea bargained a two-year sentence but had not been informed by the trial judge that he was subject to an additional three-year mandatory parole term under California Penal Code § 3000(a). The Court held that the mandatory parole

requirement was a direct consequence of the guilty plea and, thus, the plea was therefore involuntary.

In the present case, petitioner entered a plea of guilty with the understanding that he would be placed on probation after receiving no more than one year in the county jail. He was further informed that a violation of probation could result in a prison sentence of up to four years. Petitioner did eventually violate probation, was sentenced to state prison, eventually was paroled, he then violated parole and was returned to state prison, and now is presently on parole again. This Magistrate held an evidentiary hearing on September 30, 1987, at which the petitioner testified that he would not have entered a plea of guilty had he known of the parole requirement. The Magistrate believes that testimony.

The difference between this case and *Carter* is that petitioner would not have been

required to serve a mandatory parole term if he had not violated probation while *Carter* was sure to serve the mandatory parole because he had bargained for a two-year sentence. However, this difference does not compel a different result. Petitioner's plea was not voluntary and intelligent and the trial court's acceptance of the plea was, therefore, a violation of his right to due process. The error was not harmless under *Chapman* v. *California*, 386 U.S. 18 (1967) as petitioner would not have pled guilty had he known of the mandatory parole term.

IT IS THEREFORE RECOMMENDED that the writ be granted and the respondent be directed to release petitioner from any further service under the parole term.

DATED: October 5, 1987.

JOSEPH REICHMANN
United States Magistrate

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED OCTOBER 28, 1987

ROULETTE BLAIR, Petitioner, v. DANIEL McCARTHY, Respondent.	NO. CV. 87-2508-WJR (JR) FINAL REPORT AND RECOMMENDATION

This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable William J. Rea, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On October 5, 1987, the Clerk filed a Notice of Filing of Magistrate's Report and Recommendation and Lodging of Proposed Judgment, which was served on the parties,

together with copies of the Magistrate's Report and Recommendation.

Objections were filed on October 20, 1987.

It is therefore the final recommendation of the Magistrate that an Order be issued by the Court (1) approving and adopting the Report and Recommendation and (2) directing that Judgment be entered granting the petition.

DATED: October 27, 1987.

JOSEPH REICHMANN
United States Magistrate

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED OCTOBER 28, 1987

ROULETTE BLAIR, Petitioner, v. DANIEL McCARTHY, Respondent.	NO. CV. 87-2508-WJR (JR) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE

Pursuant to 28 U.S.C. § 636(b)(1)(B), the Court has reviewed the pleadings and other papers herein, the attached Report and Recommendation of the Magistrate, the Final Report and Recommendation of the Magistrate, and approves and adopts the Magistrate's findings, conclusions and recommendations.

IT IS ORDERED that judgment be entered granting the petition for writ of habeas corpus.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate's Reports and Recommendations and

the Judgment by United States mail on the petitioner and the office of the Attorney General for the State of California.

DATED: 10-27-87

WILLIAM J. REA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ENTERED OCTOBER 29, 1987

LODGED OCTOBER 5, 1987

FILED OCTOBER 28, 1987

ROULETTE BLAIR, Petitioner, v. DANIEL McCARTHY, Respondent.	NO. CV. 87-2508-WJR (JR) JUDGMENT

IT IS ADJUDGED the petition for writ of habeas corpus is granted and the respondents are directed to release petitioner from any further service under his parole term.

DATED: 10-27-87

WILLIAM J. REA
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUL 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1862

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DANIEL J. McCARTHY, Petitioner,

v.

ROULETTE BLAIR, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO CALIFORNIA ATTORNEY GENERAL'S PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States
Office of the clerk
Washington D.C. 20543

RE: Daniel McCarthy v. Roulette Blair
CASE NO. 89-1862

Dear Clerk:

Enclosed please find one original and two copies of OPPOSITION TO CALIFORNIA ATTORNEY GENERAL'S PETITION FOR WRIT OF CERTIORARI and MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS for filing. Please return one conformed copy in the return envelope provided. Thank you.

Sincerely,

POTTER & COHEN

Wendy Fan
Clerk to Paul W. Potter

Enclosures

NO. 89-1862

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DANIEL J. McCARTHY, Petitioner,

v.

ROULETTE BLAIR, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO CALIFORNIA ATTORNEY GENERAL'S PETITION FOR WRIT OF CERTIORARI

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THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

NO. 89-1862

DANIEL J. McCARTHY, Petitioner,

vs.

ROULETTE BLAIR, Respondent.

OPPOSITION TO CALIFORNIA ATTORNEY GENERAL'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, Daniel J. McCarthy, Warden and the California Attorney General, pray that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 27, 1989 and amended on February 27, 1990. A petition for re-hearing was denied by the Court of Appeals on March 26, 1990.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 881 F2d 602 and is attached as Appendix "1" to the Petition for a Writ filed by Petitioner. The order denying the petition for rehearing in the 9th Circuit is attached thereto as Appendix "2".

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., section 1254 (1) and (2).

STATEMENT OF THE FACTS

Respondent was charged in Los Angeles County with one count of violation of the California Health and Safety Code, Section 11351(a), possession of codeine for sale.

Respondent entered a guilty plea on May 23, 1983 for a bargained for sentence of probation (Docket 6).

He was sentenced, on June 21, 1983 to State Prison. That sentence was suspended and Respondent was placed on probation.

On December 11, 1984 Respondent was arrested for a probation violation. (Docket No.: 1, p. 6a.)

Respondent was initially sentenced to state prison for four years, but the sentence was later corrected and set at three years. (Docket No.: 6 Exh. I.)

On March 3, 1986, Respondent was released on parole. (Docket No. 1, p 6b.)

Respondent was arrested as a parole violator on August 20, 1986. (Docket No. 1, pp. 6a-6b.)

While in custody on a parole violation, respondent filed a federal petition for a Writ of Habeas Corpus under 28 U.S.C. Section 2254. (Docket No.1)

An evidentiary hearing was held. The Magistrate found that the Respondent was a credible witness and that he was unaware of the parole requirements at the time he entered his guilty plea and that if he had known about the parole requirements he would not have pleaded guilty. (Docket 16)

On October 27, 1987, the Honorable William J. Rea, United States District Judge adopted the Magistrate's Report and Recommendation and granted the Petition.

On November 24, 1987, the California Attorney General appealed.

On March 27, 1989, the United States Court of Appeals for the Ninth Circuit upheld the District Court.

On March 26, 1990, the Ninth Circuit denied the California Attorney General's petition for a rehearing.

On May 2, 1990, the California Attorney General petitioned this Honorable Court for a Writ of Certiorari.

On June 27, 1990, this Honorable Court ordered counsel to file a response.

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REASON FOR DENYING THIS PETITION

I

THE DISTRICT COURT CORRECTLY FOUND THAT THE RESPONDENT WAS UNAWARE OF THE COLLATERAL CONSEQUENCES OF HIS PLEA AND THAT HAD HE BEEN AWARE OF THESE CONSEQUENCES HE WOULDN'T HAVE PLEADED. THIS DETERMINATION SHOULD BE LEFT UNDISTURBED.

This case is not about retroactivity. It is about fundamental fairness arising out of the Due Process Clause of the Fourteenth Amendment.

In Rule 15 of the United States Supreme Court Rules counsel are admonished to point out any misstatements in Petitioner's Brief, in the Brief in Opposition to the granting of the Writ, lest these misstatements be deemed accepted and any objection's thereto be deemed waived.

At page seven, first full paragraph of the Attorney Gerneral's Petition for a Writ of Certiorari, there appears a significant and material misstatement. The sole issue briefed on appeal was not " The retroactivity of the new bill announced in Carter v. McCarthy ".

Counsel for respondent cited to the Ninth Circuit, as he cites to this Honorable Court inter alia Boykin v. Alabama, infra and Santobello v. New York, infra for the proposition that this case turns on a Federal XIV amendment denial, as recognized by the Seventh Circuit.

The question raised in this case is whether it was

fundamentally unfair to impose an automatic parole term of up to three years upon the Petitioner without specifically advising him of that consequence at the time of his guilty plea. The United States District Court for the Central District of California found, after an evidentiary hearing, that Respondent (then Petitioner) was not aware of that condition and that if he had been, he wouldn't have entered his plea. The District Court, thus, granted the Writ.

The United States Court of Appeal for the Ninth Circuit upheld that grant, albeit on grounds different from those argued by Mr. Blair. This however is within their discretion since an appellate court may affirm the District Court on any basis fairly presented in the record that, as a matter of law, sustains the judgment. Blair v. McCarthy 881 F2d 602, footnote 2 citing United States v. Burnette 698 F2d 1038, 1049 (9th Cir) cert. denied 461 US 936 (1983)

Long ago the United States Supreme Court held that a guilty plea may not be accepted unless the record contains affirmative evidence that it is voluntarily entered by the defendant. Boykin v. Alabama, 395 U.S. 238, 243-244, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). The court also stated that a trial court must employ "utmost solicitude. . . in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and to its consequences". Id., page 244.

In circumstances where a guilty plea "rests in any significant degree in a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled". Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). A criminal defendant

who has entered a guilty plea in reliance upon a promised sentence may thus seek to enforce specific performance of the plea bargain. Id., page 263. The majority opinion in Santobello did not articulate the specific constitutional basis of its ruling. It is fairly clear, however, that the ruling is based upon the guarantee of fundamental fairness arising out of the Due Process Clause of the Fourteenth Amendment. Id., page 267 (Concurring Opinion of Justice Douglas).

California Law imposes a mandatory period of parole "for a period not exceeding three years" upon all prisoners who have been sentenced pursuant to the provisions of California Penal Code, Section 1170. The parole term may be waived by the Board of Prison Terms "for good cause". California Penal Code, Section 3000(a). The Petitioner was sentenced in the present case pursuant to the provisions of California Penal Code, Section 1170. California law specifically requires a court at the time of sentencing to advise a defendant "that as part of the sentence after expiration of the term he may be on parole for a period as provided in [California Penal Code] Section 3000". California Penal Code, Section 1170(c).

A line of cases in the Seventh Circuit has repeatedly held that a state criminal defendant must be specifically advised that a guilty plea will result in the automatic imposition of a mandatory period of parole. In United States ex rel. Baker v. Finkbeiner, 551 F.2d 180 (7th Cir. 1977), an Illinois criminal defendant agreed to plead guilty to certain criminal charges in exchange for a promise that he would serve from one to two years in prison. No mention was made of any parole condition during the guilty plea. Illinois law imposed a mandatory two-year term of

parole upon a person convicted of the crime to which the defendant entered his guilty plea. The defendant then sought Federal habeas corpus relief seeking to annul the parole condition. The court held that the circumstances surrounding the entry of the plea violated the Due Process Clause if the sentence actually imposed upon the Petitioner significantly differed from the sentence which had been promised in the plea proceedings by the prosecutor and the trial court. Id., page 183. The court thus could find a constitutional violation if the mandatory parole term constituted a "substantial addition" to the prison term promised in the plea bargain. Id. The court then found that the two-year parole term constituted a significant additional punishment. The court thus found that the Petitioner's guilty plea was unfairly induced in violation of the Due Process Clause. Id., page 184.

The rule articulated in Baker, supra, has been consistently maintained in the Seventh Circuit. See, e.g., United States ex rel. Williams v. Morris, 633 F.2d 71 (7th Cir. 1980) and United States ex rel. Johnson v. DeRobertis, 718 F.2d 209, 210-211 (7th Cir. 1983).

The fact that there was no case absolutely "on all fours" in the 9th Circuit prior to the decision in Carter v. McCarthy, 806 F2d 1373 (9th Cir. 1986) is not relevant to the decision complained of in the instant Petition. Carter, supra merely restates an underlying rule of Constitutional Law and imposes a duty on trial judges to advise defendants entering guilty pleas of the potential parole consequences of their pleas in order to implement that rule. Nothing in Carter states that a defendant who, in addition to not being advised of a parole term was actually unaware of that parole

term has only a prospective remedy. The Constitutional violation remains the same and the issue was regularly addressed on a case by case basis in the Ninth Circuit prior to that decision.

What is relevant to this case is the fundamental Constitutional unfairness of a plea tendered by the defendant in reliance upon a bargained for result where the sentence turned out to be much harsher than that bargained for.

The parole term imposed upon the Respondent in the present case constituted a substantial addition to the term promised in the original plea bargain.

The conditions of the Respondent's parole constitute significant limitations upon the Petitioner's freedom. The Respondent is forbidden to leave the State of California or to change his place of residence without the prior approval of his parole agent. He must report any change of employment to the parole agent within 72 hours. He and his residence and property may be searched without a warrant by any agent of the Department of Corrections or by any law enforcement officer. He must comply with the instructions of his parole agent.

In addition, the Respondent is subject to further additional time in custody if he violates the conditions of his parole. The Respondent in the present case has actually served a substantial amount of custodial time as the result of parole violations.

The District Court concluded that the parole condition not mentioned in the plea agreement, but which was imposed upon the Respondent, constituted a substantial addition to the term promised in the plea bargain. It was fundamentally unfair to impose this

substantial additional custodial time upon the Respondent as the result of a plea bargain in which the Respondent was not advised of this possibility. The imposition thus violated the Due Process Clause of the Fourteenth Amendment.

To prevail, the Respondent not only had to demonstrate that he was not advised at the time of the plea of the mandatory parole condition, the Respondent had also to demonstrate that he was actually unaware of the existence of the mandatory parole conditions and that he would not have entered a plea of guilty if he had been properly advised or aware. See Wayne v. Raines, 690 F.2d 685, 687 (9th Cir. 1982); Wacht v. Caldwell, 604 F.2d 1245, 1247 (9th Cir. 1979).

He did so successfully.

The Magistrate conducted an evidentiary hearing in this matter. After a hearing, the Magistrate found:

1. At the time of the guilty plea, the Respondent did not know that he would be required to serve a parole term after he completed his prison sentence; and
2. The Respondent would not have entered the guilty plea had he known about the parole condition.

The Magistrate summed up his reasoning as follows:

This Magistrate held an evidentiary hearing on September 30, 1987, at which the Petitioner (now the Respondent) testified that he would not have entered a plea of guilty had he know of the parole requirement. The Magistrate believes that testimony.

Excerpts - Docket No.: 16

It is crystal-clear that this is a factual determination, which the California Attorney General accepts:

> **Respondent (now the petitioner) concedes that when Petitioner entered his guilty plea he was not informed of the mandatory three year period of parole pursuant to California Penal Code Section 3000 (a). Respondent accepts the findings of fact made by the Magistrate and adopted by the District Court that Petitioner would not have entered a plea of guilty had he know of the parole requirement. (California Attorney General's Opening Brief in the Ninth Circuit, page 3.)**

> It is well settled that a federal appellate court may set aside a trial court's finding of fact only if they are "clearly erroneous," and that it must give "due regard . . . to the opportunity of the trial court to judge of credibility of the witness." Fed. Rule Civ. Proc. 52(a); see Anderson v. Bessemer City, 470 U.S. 564, 573-576 (1985) (describing clearly erroneous review generally); Wade v. Mayo, 344 U.S. 672, 683-684, (1948) (applying clearly erroneous review in federal habeas proceedings). We have stressed that the clearly erroneous standard of review is a deferential one,

explaining that " if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighted the evidence differently." Amadeo v. Zant, 43 C.R.L. 304 3.4 (01988)

The Magistrate's conclusions were supported by the record. His evaluation of the case was adopted by the United States District Court, whose determination was left undisturbed by the Court of Appeals for the Ninth Circuit. This Decision should remain undisturbed.

CONCLUSION

For all of the foregoing reason, the decision of the District Court was upheld. Mr. Blair has been relieved of the parole condition to which he was unconstitutionally subjected and the Petition for a Writ of Certiorari should be denied.

DATED: July 26, 1990

Respectfully submitted,

Paul E. Potter

PAUL E. POTTER
Attorney for Roulette Blair

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to this action. My business address is 3852 East Colorado Boulevard, Pasadena, California 91107.

On July 27, 1990 , I served the following document described as **OPPOSITION TO CALIFORNIA ATTORNEY GENERAL'S PETITION FOR WRIT OF CERTIORARI** on within parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

1) Roulette Blair
C-99761
3B05 #137U
P.O.Box 3466
Corcoran, CA 93212-8310

2) William Robert Weisman, ESQ.
Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, CA 90010

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Pasadena, California.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on July 27, 1990 at Pasadena, California.

Wendy Fan
Clerk to Paul E. Potter

Supreme Court, U.S.
FILED
OCT 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1862

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1989

Daniel J. McCarthy, ***Petitioner,***

v.

Roulette Blair, ***Respondent.***

On Writ of Certiorari
to the Ninth Circuit Court of Appeals

SUGGESTION OF MOOTNESS

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No. 89-1862

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1989

Daniel J. McCarthy, *Petitioner,*

v.

Roulette Blair, *Respondent.*

SUGGESTION OF MOOTNESS

Petitioner Daniel J. McCarthy, Director of the California Department of Corrections, is constrained to file this memorandum to advise the Court of facts that arguably render this case moot.

The case at bar arose from the *habeas corpus* claim of respondent Roulette Blair that his post-prison period of state parole in California was unenforceable because he had not been informed, at the time he pleaded "guilty" to the underlying criminal offense, that post-prison parole was mandatory under California state law. The federal district court granted *habeas* relief, and the Court of Appeals for the Ninth Circuit affirmed on the ground that California had violated its own statute in failing to apprise respondent of the mandatory parole period and that the state's violation of its own law had prejudiced him. On October 1, 1990, this Court granted petitioner McCarthy's petition for writ of certiorari. The questions presented in that petition were: (1) "Whether the Court of Appeals for the Ninth Circuit has improperly and unduly expanded the scope of federal

habeas corpus relief by granting federal collateral relief in the absence of any federal violation based solely on an alleged violation of a *state* procedural rule plus a finding that it is 'reasonably probable' a different result would have occurred in the absence of the error of *state* law"; and (2) "Whether a federal court can avoid the clear limitation on retroactive application of new federal rules, by choosing to recast the issue in terms of a 'violation of state law plus prejudice,' which can be claimed in almost any federal habeas petition."

On October 12, petitioner's counsel was informed by state prison officials that respondent Blair now has been sentenced to a new state prison term because of a new burglary conviction. Under state law, respondent's prior post-prison parole period -- the parole period challenged in this *habeas* case -- was terminated automatically upon his reception into prison pursuant to the new criminal judgment and sentence. Since petitioner in this *habeas* case had sought only relief from the post-prison parole term stemming from his earlier conviction, and had not sought the setting aside of the underlying criminal conviction obtained by his "guilty" plea, the termination of the contested parole period ordinarily would render this case moot under this Court's decision in *Lane* v. *Williams*, 455 U.S. 624 (1982). In *Williams*, this Court dismissed as moot a state prisoner's similar challenge, limited to the validity of a post-prison parole period alone, because the challenged parole term had expired of its own force in the meantime.

Additional facts bearing on the mootness question, however, distinguish this case from *Williams*. Here, unlike in *Williams*, respondent Blair has also filed a separate federal civil-rights action for money damages against the State of California, the California Department of Corrections, the California Attorney General, a Deputy Attorney General, and two of respondent's

former parole agents, for their allegedly "malicious" enforcement of the parole period challenged in this *habeas corpus* case. The civil suit is pending in the federal court for the central district of California under the name *Roulette Blair* v. *State of California, et al.* (No. CV-90-1535-RSWL(Tx)). The question of the validity of respondent's post-prison parole period thus remains a matter of consequence to respondent; for, if that parole period is held to be valid after all, the civil suit for damages allegedly caused by the enforcement of the parole should fail or be seriously undermined because of *res judicata* issue-preclusion, see *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1970), or because of *stare decisis*.

Petitioner thus retains "a substantal stake" in this Court's eventual determination of whether his parole term should be deemed unlawful. *Williams*, at 632. This Court has recognized that the existence of actual rather than speculative adverse collateral legal consequences caused by an earlier criminal conviction can preserve a challenge to that conviction from mootness. *E.g., Benton* v. *Maryland*, 395 U.S. 784, 790 (1968). And it has indicated that a claim for money damages may preserve a claim from mootness even after a concomitant request for injunctive or prospective relief might become ineffectual. *E.g., Powell* v. *McCormack*, 395 U.S. 486, 495-500. In effect, the underlying dispute about the validity of the parole term in this case still retains the elements of adverse collateral legal consequences and money damages; for, unlike the speculative or remote consequences asserted in *Williams*, 455 U.S. at 632-633 fn. 13, that dispute is at issue in the existing civil rights suit between respondent and the state defendants. Respondent Blair, it should be noted, has not sought dismissal of this *habeas* case on grounds of mootness, even though he was the prevailing party in the courts

below. If he did so, he would bear the "heavy burden" of proof on the issue of mootness. *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979).

This Court, of course, might nevertheless dismiss this case as moot, despite the pendency of the respondent's civil suit, because the issue of the validity of the parole period still can be litigated in that suit rather than in this case. *See Oil Worker's Union* v. *Missouri*, 361 U.S. 363, 369-370 (1961); *American Book Company* v. *Kansas*, 193 U.S. 49, 51-52 (1903); cf. *Firefighters* v. *Stotts*, 467 U.S. 561, 571 (majority op.), 597-599 (dissenting op., Blackmun, J.). To do so, however, would undervalue the extent to which the Ninth Circuit opinion and any potential decision by this Court will approximate a declaratory judgment that might be set up in the civil suit, cf. *Supertire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 122-124 (1973); and it would unecessarily treat as a question of mootness what more properly might be termed a question of appropriate forum, cf. *Powell* v. *McCormack*, *supra*, 395 U.S. at 500. Such an approach, moreover, would fail to take account of the impact upon the states and the impact upon petitioner McCarthy, as the state official in charge of the Department of Correction, in letting stand the published decision of the Ninth Circuit Court of Appeals in this case. That opinion, in petitioner's view, egregiously expanded the scope of *habeas* relief to cases involving mere violations of state law rather than federal, law. It thus significantly affects all *habeas* cases in the Circuit, whether they arise in the context of parole advisements or not. Because of that, the Ninth Circuit opinion poses a serious threat to the constitutional values of federalism and comity in federal-state relations.

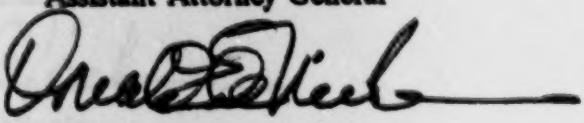
At the very least, any dismissal of this case on grounds of mootness should be accompanied by an order vacating the Ninth Circuit's opinion. As this Court has

stated: "When a claim is rendered moot while awaiting review by this Court, the judgment below should be vacated with directions to the District Court to dismiss the relevant portion of the complaint." *Deakins* v. *Monaghan*, — U.S. —, 108 S.Ct. 523 (1988). Vacating the decision of the court of appeals, indeed, was the very disposition endorsed by this Court when it dismissed the parole case in *Williams* as moot. 455 U.S. at 634.

Finally, respondent is aware of the need to continue to apprise the Court of the current status of the civil case; for, if the civil case terminates before a final decision by this Court, the characteristics that distinguish the *habeas* case at bar from the *Williams* case will disappear. Counsel for petitioner has determined, as of this date, that the state defendants in May 1990 moved to dismiss respondent's civil complaint, on statutory and constitutional grounds. The district court judge took the motion under submission in June 1990, without hearing argument. He has yet to rule on it.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the State of California
RICHARD B. IGLEHART
Chief Assistant Attorney General
EDWARD T. FOGEL, JR.
Assistant Attorney General



*DONALD E. DE NICOLA
Deputy Attorney General
Attorneys for Petitioner

*Counsel of Record

No. 89-1862

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1989

Daniel J. McCarthy, *Petitioner*,

v.

Roulette Blair, *Respondent*.

On Writ of Certiorari
to the Ninth Circuit Court of Appeals

PROOF OF SERVICE

I, Donald E. de Nicola, a Member of the Bar of this Court, certify that on October 18, 1990, three copies of petitioner's accompanying Suggestion of Mootness in this case were mailed by depositing them in a United States Post Office mailbox, first-class postage prepaid, addressed to counsel for respondent Paul E. Potter, Esq., Potter & Cohen, 3852 East Colorado Boulevard, Pasadena, California, 91107 [(818) 795-0681]. I certify that service thus has been accomplished on all parties in compliance with this Court's Rule 29.

Donald E. de Nicola
Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010
(213) 736-2190
Counsel for Petitioner

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NO. 89-1862

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DANIEL J. McCARTHY, Petitioner,

v.

ROULETTE BLAIR, Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RESPONDENT ROULETTE BLAIR'S POSITION RE: PETITIONER ATTORNEY GENERAL'S SUGGESTION OF MOOTNESS

Paul E. Potter
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3852 E. Colorado Blvd.
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(818) 795-0681

Attorney for Respondent
Roulette Blair

NO. 89-1862

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DANIEL J. McCARTHY, Petitioner,

v.

ROULETTE BLAIR, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT ROULETTE BLAIR'S REPLY TO RE: PETITIONER ATTORNEY GENERAL'S SUGGESTION OF MOOTNESS

Respondent Roulette Blair herewith files his response to The Petitioner's Suggestion of Mootness.

When the California Attorney General petitioned this Honorable Court for a Writ of Certiorari, it was Respondent's position that the ruling of the Ninth Circuit Court of Appeals, albeit decided on grounds other than those argued by Respondent in his appellate brief, was correctly decided and that certiorari should not be granted. Respondent, through counsel, filed an Opposition to the Grant of Writ of Certiorari. It is still Respondent's position that the Writ should not have been granted.

If the Suggestion of Mootness filed by the California Attorney General is read as a concession that Certiorari was improvidently

granted and if it is read as a request to dismiss the pending action before this Honorable Court, without more, then Respondent concurs whole heartedly.

Petitioner's Suggestion, however, appears to ask this honorable court to vacate the decision of the Ninth Circuit Court of Appeals and Respondent neither agrees with nor acquiesces in that request.

Respondent reasons as follows:

The pending civil suit Blair v. State of California [CV-90-1535-RSWL(TX)] seeks money damages for Respondent's continued incarceration on a parole hold, arising out of this case after the District Court had ruled in his favor and after the Ninth Circuit had ruled in his favor. Respondent's civil action pleads that this was a plain violation of the command of Federal Rule of Appellate Procedure 35 (C).

If this Honorable Court vacates the opinion of the Ninth Circuit, the Petitioner (here and defendant in the Civil action) will achieve sub silentio what not one Judge of the Ninth Circuit was willing to do, invalidate the published opinion of the panel which decided Blair v. McCarthy.

A dismissal of the Attorney General of California's Writ as improvidently granted, given the mootness as it applies vis-a-vis. The specific parole term complained of, which leaves the opinion of the Ninth Circuit in place appears to Respondent to be the best course of action and Respondent urges that course of action on the Court.

To vacate the opinion of the Ninth circuit without full briefing and argument on the merits, would be tantamount to a summary reversal of the decision below favoring the Respondent and would hand the Petitioner on a proverbial silver platter that which Petitioner has heretofore been unable to convince the United States District Court nor even one of the twenty-six Judges of the United States Court of appeals for the Ninth circuit is Petitioner's due.

Respectfully submitted,

Paul E. Potter
Attorney for Petitioner
Roulette Blair

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to this action. My business address is 3852 East Colorado Boulevard, Pasadena, California 91107.

On October 31, 1990 I served the foregoing document within parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Roulette Blair
E-72000
3B0G #129L
P.O. Box 3466
Corcoran, CA 93212-8310

Sandra Stanley, Esq.
2119 North Beachwood Drive
Los Angeles, CA 90068

Donald E. De Nicola
Supervising Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, CA 90010

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Pasadena, California.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 31, 1990, at Pasadena, California.

Wendy Fan
Clerk to PAUL E. POTTER